No. 95-685

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
I. BALTIMORE'S RESPONSE EVADES AND LEAVES UNRESOLVED THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THIS COURT AS TO THE JUDICIARY'S ROLE IN PROTECTING COMMERCIAL SPEECH RIGHTS	3
A. The Dismissal under Rule 12(b) (6)	4
B. The Third Prong: Direct and Material Advancement	5
C. The Fourth Prong: No More Extensive Than Necessary	7
II. BALTIMORE DOES NOT DISPUTE THAT A FUNDAMENTAL CONFLICT EXISTS IN THE CIRCUIT COURTS AS TO THE APPLICABLE STANDARD OF PROOF UNDER THE "DIRECT AND MATERIAL ADVANCEMENT" PRONG OF *CENTRAL HUDSON*	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) 1, 7
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 3, 5, 6, 7
Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) 5
Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984) 8
Edenfield v. Fane, 113 S. Ct. 1792 (1993) 3, 6
Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995) 3
44 Liquormart, Inc. v. Rhode Island, 115 S. Ct. 1821 (U.S. 1995) (No. 94-1140) (decision pending) 3
Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) 8
Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) 4, 6
Scheuer v. Rhodes, 416 U.S. 232 (1974) 5
Turner Broadcasting Sys., Inc. v. F.C.C., 114 S. Ct. 2445 (1994) 6
United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993) 3

STATUTES & OTHER AUTHORITIES:

Fed. R. Evid. 201 (a) advisory committee's note 5
21 Charles A. Wright & Kenneth W. Graham, *Federal Practice & Procedure* § 5103 (1977 & Supp. 1995) 4-5

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PETITIONERS' REPLY BRIEF

PRELIMINARY STATEMENT

The City of Baltimore's brief in opposition strongly reinforces our arguments for granting the petition by demonstrating the wide gap between the interpretation of the *Central Hudson* [1] test espoused by the Fourth Circuit and that which has so clearly emerged from this Court's recent commercial speech decisions.

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[1] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

The principal theme of Baltimore's opposition is that a government that imposes a ban on commercial speech should be insulated from any meaningful review by a court. Serious and substantial First Amendment challenges to the ban, Baltimore argues, may be properly dismissed *on the pleadings* solely by reference to (i) the self-serving recitations, "studies" and opinions noted in the legislative record—material of unknown reliability never subjected to cross-examination—and (ii) the alleged "common sense" of the legislative body. Although the third and fourth prongs of the *Central Hudson* test are inescapably fact-intensive, Baltimore urges that the courts' duty of judicial review under those prongs begins and ends with acceptance at face value of the assertions made by the enacting body at the time the ban is passed.

Baltimore's brief also illustrates another thesis of our petition: there are two fundamentally different approaches to the scope of judicial review of commercial speech restrictions in the circuits. One approach, represented in its most extreme version by the Fourth Circuit's decision, effectively transforms the intermediate scrutiny standard of *Central Hudson* into a highly deferential "rational basis" test in which the government always wins. The other takes *Central Hudson* principles, elaborated by this Court's application of the test in *Florida Bar, Rubin, Ibanez, Edenfield* and *Discovery Network,* as requiring that commercial speech restrictions be subjected to a meaningful level of judicial scrutiny in the crucible of an adversarial evidentiary record. Under the latter approach, the trier of fact must find that the government has met its burden of *demonstrating* that the restriction *in fact* directly and materially advances its asserted interest and that the interest could not be served as well by obvious and reasonable alternatives with less or no impact on speech.

In its brief, Baltimore studiously avoids addressing the two levels of conflict identified in the petition. Instead,

Baltimore concentrates on a premature argument of the merits of these cases. This reply brief returns to the focus of the petition: the stark conflicts in this important area of First Amendment law between the Fourth Circuit's decision and the decisions of this Court and other circuit courts.[2]

I. BALTIMORE'S RESPONSE EVADES AND LEAVES UNRESOLVED THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THIS COURT AS TO THE JUDICIARY'S ROLE IN PROTECTING COMMERCIAL SPEECH RIGHTS

Baltimore does not dispute that this Court's recent commercial speech decisions are a product of meaningful judicial review of the evidentiary record created by the government to satisfy the *Central Hudson* test and by the challenger to refute the government's showing. *See, e.g., Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995); *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). Nor does Baltimore even claim that the Fourth Circuit engaged in such judicial review, a claim that would be refuted by the Circuit Court's explicit statement that a legislature's "findings" that purportedly satisfy *Central Hudson* are not subject to "judicial review under a clearly erroneous standard or otherwise" (App., *infra*, 11a), and by its refusal to allow any development of an evidentiary record. Clearly the Fourth Circuit's de-

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[2] Baltimore speculatively argues that this petition should not be held pending the eventual decision in *44 Liquormart, Inc. v. Rhode Island*, 115 S. Ct. 1821 (U.S. 1995) (No. 94-1140) (decision pending), because that decision will not justify a summary reconsideration order in these cases. Brief in Opp. at 1-3. As explained in the petition, however, it is not at all clear whether *44 Liquormart* will be determinative in these cases. Petition at 22-23. Moreover, if Baltimore's prediction is proved correct and the *44 Liquormart* decision does not shed substantial light on the troubling and important issues raised by the Fourth Circuit's decision, then the case for granting this petition is enhanced.

cision directly conflicts with this Court's decisions as to the role of the judiciary in protecting commercial speech rights. This overarching conflict in constitutional theory permeates the three more practical, subsidiary conflicts, discussed below, concerning how the courts should apply the *Central Hudson* test.

A. The Dismissal under Rule 12(b)(6)

The Fourth Circuit's dismissal of petitioners' well-pleaded complaints under Rule 12(b)(6) conflicts with this Court's repeated statements that the government, not the challenger, bears the burden of proof under *Central Hudson*. *See, e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995). Baltimore does not dispute that the Fourth Circuit is the only federal court that has ever dismissed a commercial speech challenge under Rule 12(b)(6). Further, and more fundamentally, Baltimore does not contest that the Fourth Circuit's approach will result in the routine dismissal of commercial speech challenges on the pleadings without any opportunity for the challengers to test the government's "proof" or submit contrary evidence. Instead, Baltimore attempts to defend the Fourth Circuit's unprecedented Rule 12(b)(6) approach, dramatically underscoring its grave implications for First Amendment rights.

Baltimore contends that dismissal under Rule 12(b)(6) is appropriate because the courts must treat a government's asserted justifications for restricting commercial speech as "legislative facts," not "adjudicative facts." Brief in Opp. at 12-13 n.6. This is just another attempt to justify the Fourth Circuit's abdication of the courts' First Amendment duty to hold government to its burden of proof under *Central Hudson*. Petitioners submit—and will brief more fully if this petition is granted—that the factual inquiries raised by *Central Hudson*'s third and fourth prongs are properly characterized not as "legislative facts," but as "adjudicative facts," which are "the ultimate facts in the case, plus those evidential facts that

are sufficiently central to the controversy that they should be left to the [trier of fact] unless clearly indisputable." 21 Charles A. Wright & Kenneth W. Graham, *Federal Practice & Procedure* § 5103 at 478 (1977 & Supp. 1995); *see* Fed. R. Evid. 201(a) advisory committee's note.[3]

The Fourth Circuit's unique Rule 12(b)(6) approach conflicts with this Court's First Amendment jurisprudence (*see Discovery Network*, 113 S. Ct. 1505), the Federal Rules of Evidence (*see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2795 (1993)) and Rule 12(b)(6) itself (*see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Contrary to Baltimore's "strawman" argument, petitioners are not asking this Court to declare the Ordinance unconstitutional at the pleading stage. *See* Brief in Opp. at 4. Rather, petitioners respectfully urge the Court to review the Fourth Circuit's unprecedented Rule 12(b)(6) decision because, left untouched, it would encourage other courts to cut off First Amendment challenges regardless of what is alleged in a complaint and without any testing of the government's "proof."

B. The Third Prong: Direct and Material Advancement

Baltimore also does not dispute that a conflict exists between the Fourth Circuit's decision and this Court's recent decisions concerning the third prong of *Central Hudson*. This Court requires a government to demonstrate "in fact" that its restriction on speech "directly and materially" advances its asserted purpose, whereas the Fourth Circuit required Baltimore to show only that it "reasonably" believed that a "logical nexus" exists be-

[3] Baltimore also asserts that Rule 12(b)(6) dismissal is appropriate because, in its unsubstantiated view, petitioners raised only facial, and not as-applied, challenges to the Ordinance. Brief in Opp. at 12 n.6. Baltimore simply ignores petitioners' demonstration that they raised both types of challenges (Petition at 5 n.4) and does not explain why a facial challenge should be subject to Rule 12(b)(6) dismissal.

tween its restriction and its asserted purpose. App., *infra*, 14a, 16a. Instead of addressing that conflict, Baltimore argues the merits of these cases, and in so doing, reinforces the importance of granting this petition to clarify the duty of the judiciary under the third prong.

In a premature effort to show this Court that it satisfied the third prong, Baltimore offers the same lengthy recitation of the legislative history of its Ordinance that was relied on by the Fourth Circuit. Brief in Opp. at 5-9. But that legislative history, and particularly what is missing from it, further underscores the Fourth Circuit's misunderstanding of its duty under *Central Hudson*. Nowhere in that history is there any evidence of how the Ordinance, with its myriad exceptions, in fact will affect the exposure of Baltimore's minors to outdoor advertising for alcohol beverages. Nor is there any evidence concerning the extent to which Baltimore's minors will continue to be exposed to alcohol beverages in every other advertising medium and in the social settings of contemporary life. Because the Fourth Circuit did not have before it any evidence on these issues, its decision cannot possibly be harmonized with this Court's decisions that require the judiciary to hold the government to a "demonstration in fact" standard of proof under the third prong. *See Rubin*, 115 S. Ct. at 1592 (*citing Edenfield*, 113 S. Ct. at 1800); *Discovery Network*, 113 S. Ct. 1505; *see also Turner Broadcasting Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2471-72 (1994) (remanding First Amendment case to district court because, in the Court's "independent judgment of the facts," the government had not met its burden of proof).

Notwithstanding its several attempts, Baltimore fails to make the conflict on the third prong disappear. Baltimore is plainly wrong when it states that the Fourth Circuit "articulated" and held Baltimore to the *Edenfield* "demonstration in fact" standard. Brief in Opp. at 4-5. The Fourth Circuit never articulated anything close to

that standard, and instead applied its own "reasonable belief" standard. App., *infra*, 14a, 16a. Baltimore also argues that the Fourth Circuit merely followed this Court's decision in *Central Hudson*, which recognized an "immediate connection between advertising and demand for electricity." Brief in Opp. at 11. Neither the record nor the decision in *Central Hudson* supports the Fourth Circuit because plaintiffs there did not challenge New York's assertion that its restriction on advertising to promote usage would reduce consumption of electricity. In contrast, petitioners explicitly alleged that Baltimore's elimination of a small fraction of alcohol beverage advertising—without affecting any other social influences—will not directly and materially reduce illegal underage drinking. App., *infra*, 74a.

In a final attempt to deny the conflict created by the Fourth Circuit's decision, Baltimore claims that the Fourth Circuit was permitted to use "common sense" to find that the government had satisfied the third prong. But it is certainly not "common sense" that reducing minors' exposure to some outdoor advertising for alcohol beverages, while leaving all other alcohol beverage advertising and social influences untouched, will directly and materially reduce illegal underage consumption. *See Discovery Network*, 113 S. Ct. 1505. Further, even if that purported cause-and-effect relationship made sense intuitively to the Fourth Circuit, that court's process conflicted with this Court's established practice of allowing challengers of First Amendment restrictions to submit evidence that might belie "common sense" assumptions. *See* Petition at 12. In short, the Fourth Circuit's "reasonable belief" approach to the third prong cannot be reconciled with this Court's *Edenfield* standard, and that conflict alone merits the granting of this petition.

C. The Fourth Prong: No More Extensive Than Necessary

Baltimore does not dispute that the Fourth Circuit's decision conflicts with this Court's holdings in *Discovery*

Network, *Florida Bar* and *Rubin* concerning the fourth prong. In defiance of those decisions, the Fourth Circuit held that Baltimore's failure to address "obvious less-burdensome alternatives" to its restriction on speech was beyond judicial review. *See* Petition at 15-17. But Baltimore professes ignorance as to why that holding "would be of interest or importance to anyone other than [petitioners]." Brief in Opp. at 13. Obviously, the Fourth Circuit's radical rewriting of the fourth prong to eliminate enforcement of the government's burden of proof is of vital importance to all commercial speakers and the public.

II. BALTIMORE DOES NOT DISPUTE THAT A FUNDAMENTAL CONFLICT EXISTS IN THE CIRCUIT COURTS AS TO THE APPLICABLE STANDARD OF PROOF UNDER THE "DIRECT AND MATERIAL ADVANCEMENT" PRONG OF *CENTRAL HUDSON*

In purporting to discuss the conflict in the circuits that was identified by petitioners, Baltimore appears to be addressing a petition different from the one that we filed.[4] Petitioners demonstrated that the Fifth, Ninth and Tenth Circuits have held government to the *Edenfield*

[4] Baltimore irrelevantly claims that there is no conflict in the circuits as to the *results* in cases challenging restrictions on alcohol beverage advertising. But the two other decisions that it identifies are of no value because they depend upon the erroneous notion that the Twenty-first Amendment somehow reduces the government's burden under *Central Hudson*. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 750 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 498 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Indeed, Baltimore's reliance on the *Dunagin* and *Crisp* decisions is inconsistent with its attempt to distinguish the First Circuit's decision in *44 Liquormart* on the ground that it is dependent on the Twenty-first Amendment. Brief in Opp. at 2. In any event, Baltimore's result-driven analysis misses the point that *Central Hudson* requires each case to be decided based on the particular restriction being challenged and the evidentiary record developed in the trial court.

"demonstration in fact" standard for the third prong, whereas the First and Fourth Circuits have applied a "reasonable belief" standard based on their reading of this Court's earlier decisions in *Posadas* and *Metromedia*. Petition at 17-19. Yet neither of these irreconcilable standards is discussed anywhere in Point II of Baltimore's brief. That silence speaks volumes: the existence of this important and unsettling conflict in the circuits is beyond dispute.

CONCLUSION

The petition for a writ of certiorari should be granted.

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